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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Telecommunications Services Inside Wiring	)	CS Docket No. 95-184
Customer Premises Equipment	)	
In the Matter of	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992:	)	MM Docket No. 92-260
Cable Home Wiring	)	

FURTHER JOINT COMMENTS OF
BUILDING OWNERS AND MANAGERS ASSOCIATION INTERNATIONAL
INSTITUTE OF REAL ESTATE MANAGEMENT
INTERNATIONAL COUNCIL OF SHOPPING CENTERS
NATIONAL APARTMENT ASSOCIATION
NATIONAL MULTI HOUSING COUNCIL AND
NATIONAL REALTY COMMITTEE

Summary

The joint commenters recognize that the proposed amendments to the Commission's cable home wiring rules and the proposed new home run wiring regulations are intended, in part, to benefit building owners and managers by making it easier for them to introduce competition for video programming services in their buildings. We support the Commission's goal of enhancing competition and would welcome an approach that advances that goal. To that extent, the joint commenters applaud the Commission's efforts and support the proposed rules.

It is not clear, however, that the Commission has the authority to adopt the rules. The Commission has no jurisdiction over building owners as building owners. It also appears that the Commission has overstated its authority under Sections 624(i), 623(b) and 4(i). The joint commenters do not believe that any of those sections, singly or in combination, gives the Commission the authority to alter the substantive rights of building owners under state law or contract or to exercise jurisdiction over them in any way.

To the extent that the Commission does have authority to adopt the rules, they present a number of practical problems:

- Incumbent operators must be required to post bond before removing wiring. This will greatly reduce the likelihood that cable operators will act carelessly in removing wiring.
- Operators should not be permitted to abandon wiring without the consent of the building owner. Why should the building owners be required to bear the expense of removing accumulated and unwanted wiring?
- Access to molding and conduit should be permitted only with the prior consent of the building owner, to ensure that cable operators notify owners of their presence and to prevent a taking of the conduit.
- The Commission should clarify that the rules are not intended to preempt or supersede state law or contract rights.
- The Commission should shorten the notice requirements and other deadlines.
- Incumbent operators should have an affirmative obligation to provide service until the new provider is ready to begin operations in the building.

The joint commenters are concerned that the Commission is unnecessarily inviting Fifth Amendment challenges by placing an artificial price on cable wiring, rather than letting the market determine the price. The ensuing legal challenges would likely impede progress toward a market-based solution.

The joint commenters see the Commission's proposal as only a first, but incomplete, step until evergreen contracts can be examined. Without "fresh look," the ultimate free-market solution, taking advantage of the natural forces of competition in the real estate market, cannot be achieved.

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Introduction

The joint commenters, representing the owners and managers of multi-unit properties,[1] submit these Further Comments in response to the Commission's Further Notice of Proposed

[1] The joint commenters are the Building Owners and Managers Association International, the Institute of Real Estate Management, the International Council of Shopping Centers, the National Apartment Association, the National Multi-Housing Council, and the National Realty Committee. The joint commenters have filed comments in Docket No. 92-260 dated March 18, 1996 (the "Home Wiring Comments"), and reply comments dated April 17, 1996 (the "Home Wiring Reply Comments"). In Docket No. 95-184, the joint commenters filed comments on

Rulemaking released August 28, 1997 (the "Further Notice"). The joint commenters recognize that the proposed amendments to the Commission's cable home wiring rules and the proposed new home run wiring regulations are intended, in part, to benefit building owners and managers by making it easier for them to introduce competition for video programming services in their buildings. We support the Commission's goal of enhancing competition and would welcome an approach that advances that goal. To that extent, we applaud the Commission's efforts and support the proposed rules. There are aspects of the rules that trouble us, however.

First, it is not at all clear that the Commission has the authority to adopt the rules. To the extent that the Commission seeks to regulate entities that clearly fall within its jurisdiction, such as video programming providers, this is of little concern to us. The proposed rules, however, appear to assert jurisdiction over building owners as building owners, to alter the rights and duties of building owners under state law and contract, and possibly to implicate the Fifth Amendment. To the extent that this is the case, we oppose the proposed rules, however beneficial they may be.

Second, the joint commenters believe that the proposed rules may prove unnecessary and even counterproductive. On one hand, the proposed rules may enhance clarity and promote competition, but on the other they may only serve to introduce further confusion and encourage legal wrangling. This would interfere with the natural forces of competition in the real estate market and impede achievement of the Commission's objectives. We have repeatedly stated that the real estate market is on its way to introducing the competition that the Commission seeks to achieve. *See, e.g.,* Home Wiring Comments at p.5. We continue to believe that the

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March 18, 1996 (the "Inside Wiring Comments") and reply comments on April 17, 1996 (the "Inside Wiring Reply Comments").

Commission's goals for increased competition will be met as the rental market adjusts to the advancement of technology and the needs of consumers.

I. PROPERTY OWNERS SUPPORT INCREASED CONSUMER CHOICE AND BELIEVE THE MARKET WILL MEET THE COMMISSION'S GOALS BEFORE REGULATION DOES.

The Further Notice contains several passages recognizing that more needs to be done to give MDU residents access to competing video programming providers. *See* Further Notice at ¶¶ 11, 25-31, 47. We support the goal of introducing competition for the delivery of video programming services. Indeed, as our earlier comments indicate, many building owners are actively seeking to offer such competition. Home Wiring Comments at p. 8; Home Wiring Reply Comments at p. 7; Inside Wiring Comments at pp. 17-26. In time, the market will deliver MDU residents the services they want because building owners know that they are in the business of serving and pleasing tenants. Advanced telecommunications and video programming are fast becoming ubiquitous, and building owners must adapt to survive.

The Commission's proposal, however, seems not to recognize that it is unrealistic and unreasonable to expect competition to develop overnight. There have been enormous changes in the telecommunications industry in the past five years, and we are only at the beginning of a long process of development and deployment. The real estate industry is responding to all of these technological and market trends.

We agree, however, with the Commission's assessment that there are many other factors that affect the development of competition. See Further Notice at ¶ 31. Perpetual, "evergreen," and very long-term contracts in particular make it very difficult for building owners to introduce competition. But the proposed rules do not address those issues. Indeed, we suspect that the proposed rules will be ineffective simply because they apply to a relatively small number of

cases. Since the rules do not address instances in which there is a dispute over ownership of the wiring or the operator's right to be on the premises and by the Commission's own admission are only intended to establish a procedural framework, we believe that they will do little to advance the Commission's goals. Consequently, we are more convinced than ever that the market will resolve the issue more efficiently and effectively than regulation.

II. THE PROPOSED RULES PRESENT A NUMBER OF PRACTICAL PROBLEMS.

Although the Further Notice states that the proposed rules are intended to establish a procedural mechanism for MDU owners to enforce their rights, the rules raise a number of specific issues that potentially restrict the rights of building owners or create a risk of harm to building owners. If the Commission is to adopt this "procedural mechanism," it must ensure that the mechanism does not in fact amount to substantive regulation. As mentioned above, we question the Commission's authority to alter the substantive rights of building owners who are not engaged in the telecommunications business, and object to any such regulation. Nevertheless, to the extent that the Commission can create a procedural mechanism without affecting substantive rights, we offer some suggestions for clarifying the proposed rules.

A. Incumbent Operators Should Be Required to Post Bond Before Removing Any Wiring.

The proposed rules give incumbent providers the right to elect whether to sell home run wiring, abandon the wiring, or remove it. If the operator elects to remove the wiring, it must restore the building to its prior condition. This provision addresses some of the concerns expressed in the joint commenters' *ex parte* letter in Docket No. 92-260 of July 2, 1997, which noted that the incumbent operator would have little incentive to exercise due care in removing the wiring and might be tempted to retaliate for the termination of service. Nevertheless, we

continue to believe that operators should be required to post a security bond to ensure the proper performance of the work. The proposed rule, while helpful, would only be enforceable through litigation, which entails additional time, trouble, and expense. The rule will be ineffective without a bond requirement or some other self-executing enforcement mechanism.

We suggest that the amount of the bond be based on the number of feet of wiring to be removed, as a proxy for the potential extent of the damage that could be caused upon removal of the wire. Our *ex parte* letter proposed that the bond be twice the value the operator sets on the wiring.

B. Incumbent Operators Should Not Be Allowed to Abandon Wiring Without the Prior Consent of the Building Owner.

The proposed rules would give incumbent operators the unilateral right to abandon home run wiring. In some cases, however, building owners might prefer that the operator completely remove the wiring. Over time, as multiple operators install their cables in risers and conduits, it can become increasingly difficult to manage the riser space. Owners and managers of commercial buildings have found that telephone wiring accumulates as tenants leave the premises and abandon their wiring. Eventually, the wiring must be removed – at the owner's expense – either to make room for new wiring or to allow installers and maintenance personnel to readily distinguish abandoned wiring from wiring that is still in service. As competition grows, this will become an issue for video cabling as well. Indeed, the proposed rules may actually accelerate and heighten this phenomenon.

The building owner should not bear the burden of removing abandoned property without its consent. In those instances in which a building owner or manager determines that abandoning wiring would be detrimental to the safety or efficient management of the property, the owner or

manager should be allowed to require the removal of the wiring, either by the incumbent operator, or at the provider's expense.

C. Access to Molding and Conduits Should Be Permitted Only With the Prior Consent of the Building Owner.

Proposed rule Section 76.805 would permit a multichannel video service provider to install home run wiring in existing molding or conduit if there is sufficient space, if the installation would not interfere with the ability of an existing provider to deliver service, and if the building owner does not object to the installation. This provision infringes on the property rights of the building owner and promises to be the source of much mischief if adopted. A service provider can only be allowed access to molding or conduit with the prior written consent of the building owner. The owner should not be required to object in order to enforce its right to control its property. The proposed rule would impose an unnecessary and unreasonable burden on the owner, and appears to give providers rights to which they are not otherwise entitled. The proposed rule would give providers an incentive not to inform property owners, but to assert a right to enter and install wiring without the owner's knowledge. At best, this would create conflict between providers and owners – at worst it could amount to an unconstitutional taking.

D. The Rules Would Promote Confusion, Not Clarity, Because They Appear To Limit Building Owners' Rights Under State Law and Contract.

The Commission's proposed procedural mechanism raises many questions about the continued application of state law and contracts between building owners and incumbent providers. For example, the notice requirements of proposed Sections 76.804(a)(1) and (b)(1) rule could be alleged to preempt the rights of building owners. What if state law or a contract provide for shorter notice requirements? What if state law or contract require no notice? Has a

building owner lost the right to negotiate for the sale of wiring under existing law if it fails to meet the notice requirements of the new rules?

Similarly, by not addressing such issues as bonding or other security for removal of wiring and restoration of property, the proposed rules threaten to nullify the negotiated terms of those contracts that contain such provisions. Even if that is not the Commission's intention, we would not be surprised to find operators pointing to the rules as the sole source of building owners' rights and operators' obligations. In short, although the Further Notice states that the rules are intended to promote clarity, the joint commenters believe that they may have the opposite effect. Those building owners that have protected their interests through negotiation or are aware of their rights under state law will be confronted by operators alleging that the Commission's rule is the last and only authority. This will only muddy the waters further.

E. The Notice Requirements and Other Deadlines for Decisions Are Too Long.

As we noted in the preceding section, the proposed notice requirements might be interpreted as preempting building owner's rights under state law or contract. One way to limit the effects of this problem would be to shorten the timelines for decisions. In any case, requiring a building owner to give 90 days notice when the operator already knows the contract is about to expire seems unnecessary. We also do not believe it should take an operator 30 days to decide whether to sell, abandon, or remove the wiring, nor does it take thirty days to negotiate the sale of the wiring. We would support shorter deadlines.

F. Incumbent Operators Should Have a Strong and Clear Obligation to Maintain Service Until the New Provider is Ready to Take Over.

Section 76.804(b)(5) of the proposed rules requires all parties to "cooperate to ensure as seamless a transition as possible for the subscriber." We support this provision, but are

concerned that it does not go far enough. For the rules to work, incumbent operators must have an affirmative obligation not only to cooperate, but to provide service until the new provider is able to commence operations in the building. Otherwise, the incumbent might be tempted to drag its feet while making a pretense of cooperating. The new provider and the building owner could find themselves facing disgruntled residents if service were cut off before the new provider was fully in place. Although it would seem that the incumbent would have an incentive to continue to provide service as long as possible, both to preserve the revenue stream and for public relations reasons, this may not always be the case. Therefore, the incumbent should have an affirmative obligation to maintain service.

III. THE COMMISSION SHOULD AVOID INFRINGING FIFTH AMENDMENT PROPERTY RIGHTS.

We have repeatedly emphasized to the Commission the importance of respecting Fifth Amendment rights. Home Wiring Comments at p. 5; Inside Wiring Comments at pp. 5-9; Inside Wiring Reply Comments at p. 10. For that reason, we cannot support any rule that would effect an unconstitutional taking of property, whether of building owners or others. It is not at all clear to us that a regulation that purports to give a party a choice of how to deal with its property does not constitute a taking in some cases. *See* Proposed Rule § 76.804(a)(1), (b)((1). The question would seem to turn on how realistic the choice is. An unrealistic choice that forces a cable operator to undergo an expense greater than the value of the wiring in order to preserve its rights in the wiring, for example, would seem to be tantamount to a taking.

Specifically, we believe that the Commission may raise Fifth Amendment issues by attempting to set the price of wiring by regulation, rather than by permitting the marketplace to establish that price. Instead, as would apparently be permitted by Proposed Rule § 76.804, the

price of home run wiring should be determined through negotiations between the cable operator and the purchaser. We also believe the same rule should apply to cable home wiring. Building owners do not need the same protections in their dealings with cable operators as might be warranted for individual subscribers. Any other approach would only enhance the likelihood of a taking. There is no reason to believe that a building owner willing to buy wiring and a cable operator willing to sell it will be unable to agree on a fair and reasonable price.

IV. THE COMMISSION HAS NO JURISDICTION OVER BUILDING OWNERS AND SHOULD NOT ADOPT ANY PROPOSAL THAT REQUIRES IT TO ASSERT SUCH JURISDICTION.

Throughout the course of this proceeding, the joint commenters have sought to remind the Commission that its jurisdiction is limited to the field of telecommunications. *See* Inside Wiring Comments at pp. 2-5; Home Wiring Comments at pp. 2-6. The Commission has no jurisdiction over building owners as building owners. *See Illinois Citizens Committee for Broadcasting v. Sears, Roebuck & Co.*, 35 FCC 2d 237, *aff'd sub nom. Illinois Citizens Committee for Broadcasting v. FCC*, 467 F.2d 1397 (7th Cir. 1972). In stating that the proposed rules "do not grant MDU owners any additional rights, but simply establish a procedural mechanism for MDU owners to enforce rights they already have," Further Notice at ¶ 47, the Commission seems to acknowledge this fact. We reiterate this point because, although the proposed rules may benefit building owners in certain cases, we continue to believe that the issues before the Commission are best resolved without government regulation.

Furthermore, as discussed in Part II *ante,* it appears that the proposed rules do limit the rights of building owners and may impose new obligations on them. To the extent that this is the case, we challenge the Commission's authority to adopt the rules.

In particular, the Commission relies on expansive readings of Sections 624(i), 623(b), and 4(i). As we stated in our Home Wiring Reply Comments, at pp. 3-5, we do not believe that Section 624(i) applies to wiring outside a particular subscriber's unit, and a building owner falls outside the definition of "subscriber."[2] To the extent that the Commission is asserting jurisdiction over building owners by asserting that they are subscribers, we believe the Commission is in error.

The Further Notice also overstates the Commission's authority under Section 623(b). Section 623(b) might conceivably give the Commission the authority to regulate the rates at which cable operators sell cable home wiring and home run wiring, but it does not give the Commission the authority to give building owners the right to acquire wiring or require cable operators to sell it. If it did, Congress would not have had to enact Section 624(i) to allow cable subscribers to buy their home wiring. Therefore, the Commission's authority to establish reasonable basic cable rates under Section 623(b) cannot be broad enough to encompass the proposed procedure.

We also believe that the Commission overstates its authority under Section 4(i). If the Commission were correct, it would have the authority to do anything that Congress has not explicitly forbidden. This cannot be true, even "in the administrative setting." The Commission's reliance on *Mobile Communications Corp. v. FCC*, 77 F.3d 1399 (D.C. Cir.), *cert.*

[2] Section 624(i) directs the Commission to "prescribe rules concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator within the premises of such subscriber." The Commission's own rules define a "subscriber" as a "member of the general public who receives broadcast programming distributed by a cable television system and does not further distribute it." 47 C.F.R. § 76.5(ee). We note that Section 624(i) uses the term "subscriber," not "person," which is defined broadly in Section 611(15), so Congress must have meant to limit the right to buy wire to something less than any "person." Indeed, the Commission's definition of subscriber seems to be what Congress had in mind.

denied, 117 S.Ct. 81 (1996) is misplaced. That case does not authorize the Commission to exercise jurisdiction outside the bounds of the Communications Act.[3]

Conclusion

The Commission has worked very hard to develop proposed rules that might bring some clarity to a complex area, in which past monopoly practices linger and impede the growth of competition. We applaud this effort. It is not clear, however, that the Commission has the authority to impose the rules. It is also not clear that the rules will satisfactorily address the problem. The rules may enhance competition, but then again they may only serve to introduce further confusion and encourage legal wrangling. This would interfere with the natural forces of competition in the real estate market and impede achievement of the Commission's objectives.

[3] What Section 4(i) really means is that the FCC may adopt reasonable measures to accomplish the goals of the Communications Act. *See, e.g., New Eng. Tel. & Tel. Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987) *cert. denied*, 490 U.S. 1039 (1989); *Lincoln Tel. Co. v. FCC*, 659 F.2d 1092 (D.C. Cir. 1981); *Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1975). It does not mean that the Commission may "rewrite a statutory scheme on the basis of its own conception of the equities of a particular situation." *AT&T v. FCC*, 487 F.2d 865, 880 (2d Cir. 1973).

While the proposed rules might prove beneficial, we also believe that the Commission's goals for increased competition will be met as the rental market adjusts to the advancement of technology and the needs of consumers.

Respectfully submitted,

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